

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FHFC CASE NO. 2019-080V
Application No.: 2017-156C
FLORIDA HOUSING
FINANCE CORPORATION

GM SILVER CREEK, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

PETITION FOR VARIANCE FROM FLORIDA ADMINISTRATIVE CODE
RULE 67-48.023(2) F.A.C (2016)

Petitioner, GM Silver Creek, Ltd. ("Petitioner"), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions Florida Housing Finance Corporation ("Florida Housing") for a waiver or variance from the provisions of Rule 67-48.023(2), Florida Administrative Code (2016) (the "Rule") to allow it to utilize the Average Income Test to calculate its Minimum Set-Aside Commitment as allowed by the Internal Revenue Code section 42(g)(1)(C). In support of this Petition, Petitioner states as follows:

Petitioner and the Development

The name, address, telephone, and facsimile numbers for Petitioner and its qualified representative are:

GM Silver Creek, Ltd.
Attn: Mitchell Rosenstein
100 SE 3rd Ave, FL 10
Ft. Lauderdale, Florida 33394
Email: mrosenstein@greenmillsgroup.com
Telephone: (954) 507-6220
Facsimile: N/A

The name, address, telephone and facsimile numbers of Petitioner's counsel is:

Samantha D'Angelo, Esq.
Nelson Mullins Broad and Cassel
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801-4961
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On December 13, 2016, Petitioner submitted an application in response to RFA 2016-114 for Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County and was assigned Application No. 2017-156C (the "Application") requesting \$2,050,000 (annually) in low-income housing tax credits to assist in the construction of a 90-unit development located in Miami-Dade County, Florida, known as Silver Creek Apartments (the "Development"). On October 4, 2017, Petitioner submitted a Petition for Rule Waiver to reduce the Total Set-Aside Percentage from 100% to 90%, which was granted by Florida Housing on October 27, 2017. Further, on June 20, 2019, Petitioner submitted to Florida Housing an income averaging set-aside change request to change its minimum set-aside election to use the Average Income Test.

Type of Waiver

The waiver being sought is permanent in nature.

Rule For Which a Variance Is Requested

Rule 67-48.023(2) requires that each Development comply with the minimum Housing Credit Set-Aside provisions as specified in the version of Section 42(g)(1) of the Internal Revenue Code (the "IRC") that was in effect at the time the rule was adopted. Prior to March 23, 2018, this Section of the IRC did not allow income averaging, and therefore Rule 67-48.023(2), which was adopted prior to that date also did not allow income averaging.

Statutes Implemented by the Rule

The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the “Act”), the statutes relating to the allocation of Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes.

Justification for Granting Waiver of the Rule

During its 2018 session, the United States Congress passed the “Consolidated Appropriations Act, 2018” (“H.R. 1625”), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

“(C) AVERAGE INCOME TEST. –

(i) IN GENERAL. – The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.

(ii) SPECIAL RULES RELATING TO INCOME LIMITATION. -
For Purposes of clause (i)

(I) DESIGNATION. - The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause

(II) AVERAGE TEST.- The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income

(III) 10-PERCENT INCREMENTS. - The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income.” Section 42(g)(1)(C), I.R.C. (2018)

Rule 67-48.0023(2) F.A.C. was revised on July 8, 2018 to incorporate the new subsection 42(g)(1)(C) of the IRC. Petitioner’s application in response to the RFA was submitted prior to the date of the adoption of the Average Income Test under section 42 of the IRC and prior to the

July 8, 2018 rule revisions. Therefore, a waiver is necessary to implement both the intent of federal law and Florida Housing's policy.

Petitioner is seeking a waiver of the Rule, to the extent necessary, to allow Petitioner to use the income averaging set aside and to change its set-aside percentages to permit the income averaging. The income averaging set asides are currently contemplated to be 15 units at 30% area median income, 36 units at 60% area median income 15 units at 70% area median income and 15 units at 80% area median income. The proposed set asides average 60% of area median income, which satisfies the Florida Housing Average Income Test requirements. Further, in connection with the Average Income Test, Petitioner will allocate 15 units at 30% area median income to satisfy Florida Housing's Best Practices on Income Averaging guidelines with respect to ELI units.

Under Section 120.542(1), Florida Statutes, Florida Housing has the authority to grant waivers to or variances from its requirements when strict application of the requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Granting the requested variance in this instance would allow Petitioner to utilize the Average Income Test as allowed by the Internal Revenue Code and would allow Petitioner to be treated the same as other affordable housing owners who, under federal law, are permitted to use

that set aside. Without a corresponding waiver of the Rule, the Petitioner would be treated differently than other similarly situated owners. Further, if Petitioner were able to use the Average Income Test, the Petitioner would increase the 9 units currently designated at 30% area median income to satisfy the ELI set-aside requirement to 15 units at 30% area median income. A variance of the Rule would result in an increase in the supply of deeper set-aside units available for affordable housing. Additionally, with the use of the Average Income Test, more units would be available to the workforce (i.e., those earning over 60% area median income but below 80% area median income) and would help provide affordable housing to those who would not otherwise qualify for affordable housing prior to the implementation of the Average Income Test.

In this instance, Florida Housing has jurisdiction to grant a waiver of the Rule and Petitioner meets the standards for a waiver of the Rule.

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Action Requested

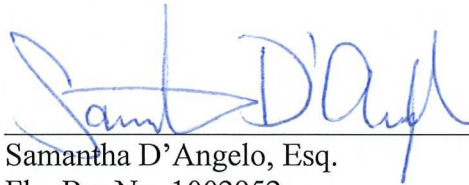
WHEREFORE, Petitioner respectfully requests that Florida Housing:

Grant this Petition and all relief request therein;

Grant a variance from the Rule and allow for calculation of the minimum set aside percentage based on income averaging; and

Grant such further relief as may be deemed appropriate

Respectfully submitted this 19th day of September, 2019.



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COUNSEL FOR PETITIONER

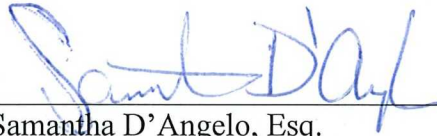
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed by electronic delivery to:

Florida Housing Finance Corporation,
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
CorporationClerk@floridahousing.org,

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us

This 19th day of September, 2019.



Samantha D'Angelo, Esq.
Fla. Bar No. 1002952